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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re M.D., et al., Persons Coming Under the Juvenile Court Law.	2d Juv. No. B294084 (Super. Ct. No. 17JD-00293) (San Luis Obispo County)
SAN LUIS OBISPO COUNTY DEPARTMENT OF SOCIAL SERVICES, Plaintiff and Respondent, v. T.B., Defendant and Appellant.	

T.B. (mother) appeals the juvenile court's order terminating parental rights to her minor children M.D. and Y.D. with a

permanent plan of adoption. (Welf. & Inst. Code[1], § 366.26.) Mother contends the court erred in finding that the beneficial parental relationship to adoption (*id.*, subd. (c)(1)(B)(i)) did not apply. We affirm.

FACTS AND PROCEDURAL HISTORY

T.B. and Y.J.D.[2] are the parents of M.D., born in November 2013, and Y.D., born in March 2016. In October 2017, the San Luis Obispo County Department of Social Services (DSS) filed a dependency petition alleging that mother and father were regularly using heroin, that mother was breastfeeding Y.D. while using the drug, and that Y.D. had tested positive for opiates. The children were detained and both parents were provided weekly supervised visitation.

At the conclusion of the jurisdiction and disposition hearing, the court awarded both parents six months of reunification services and set the matter for a three-month review hearing. The parents' case plans required them to, among other things, complete a drug and alcohol assessment, participate in random drug testing and drug treatment through Drug and Alcohol Services (DAS), and participate in and complete a parenting program approved by the social worker.

In its interim review report, DSS stated that both parents were "out of compliance with their . . . case plan and remain in a state of denial." Although mother had entered outpatient treatment shortly after reunification services were awarded, she "had poor attendance and was inconsistent with her substance

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[1] All statutory references are to the Welfare and Institutions Code.

[2] Father is not a party to this appeal.

testing." She was subsequently accepted into a residential treatment program but declined to enter the program. When the social worker asked mother why she had declined to do so, she replied that she had "'started using on purpose' this week just to show that she could test clean without residential treatment." Mother also said, "I don't need any extra help, [I] can do it by myself." By January, mother started missing her visits with the children and her cell phone had been disconnected. She was accepted into another residential treatment program, but DAS was unable to contact her. At the end of January, father was arrested for possession of a controlled substance, possession of drug paraphernalia, and theft.

DSS nevertheless recommended that both parents continue to receive reunification services and that the matter be set for a six-month review hearing. The court adopted that recommendation and the six-month review hearing was set for May 9, 2018. The court advised both parents "that the case goes like a rocket ship. There's no time to fiddle around and say, 'You know, I don't need to deal with this issue right away' because . . . children need parenting, and they need capable and safe parents right away, particularly at a young age, and if they don't get that somebody else is going to parent the kids."

In its report for the six-month review hearing, DSS recommended that reunification services be terminated and that the matter be set for a permanency planning hearing pursuant to section 366.26. In March 2018, mother entered a residential drug treatment program but left the program shortly thereafter. Mother was also inconsistent in her visitation with the children. She regularly missed her weekly telephone calls with the children and missed 7 of her 22 twice-weekly supervised visits.

At the May 9, 2018 hearing, mother and father requested that the matter be set for a contested hearing. Mother's counsel offered that mother "has re-engaged, is currently on the waiting list to get into a residential treatment, and she's very keen to have a contested hearing." Father's attorney represented that father "also intends to enter a treatment program shortly." The children's counsel stated that the children were doing well in their current placement and added, "I certainly support at this point [DSS's] recommendation" that services be terminated. Counsel for DSS represented that "Amy Carlyle from [DAS] . . . screened both parents on May 1st, [and] the recommendation was still residential treatment. Ms. Carlyle indicated both parents were scheduled to meet with the case manager on May 2nd to work on placement in residential [treatment] but no-showed and did not contact us to cancel the appointment. . . . [T]hey also needed to drug screen but they left without an explanation."

The court set the matter for a contested hearing on June 6, 2018, but the hearing was continued to June 15 because father was in custody and hospitalized for drug-related issues. Neither parent appeared at the June 15 hearing. Father's attorney stated that he was unable to contact father, who had been released from custody. Mother's counsel represented that although mother had not contacted her, she was scheduled to begin a seven-day drug detox program in Santa Maria on June 18.

After the parties submitted on the DSS's six-month review report, the court terminated reunification services and set the matter for a section 366.26 hearing in October 2018. Both parents were granted monthly supervised visitation. The matter was also set for an August 2018 service review hearing. Mother

and father were both served with notice of that hearing, but neither of them appeared at the hearing.

In its report for the section 366.26 hearing, DSS recommended that parental rights to M.D. and Y.D. be terminated with adoption as the children's permanent plan. DSS reported that since the last hearing, both parents had been arrested on drug-related charges. Since reunification services were terminated in June 2018, the parents had visited the children only once, on July 24, 2018. Moreover, neither parent had called to confirm the visit in accordance with their March 2018 visitation contract.

Since July 28, 2018, M.D. and Y.D. had been living in San Diego with their paternal aunt and her fiancé (the prospective adoptive parents). DSS reported that the prospective adoptive parents "ha[ve] known these children since they were babies" and had previously lived with the children, their parents, and their paternal grandparents. According to the social worker, the prospective adoptive parents "have a strong, positive and loving relationship with [the] children and the children reciprocate the love and affection." Both children were "excited" to be living with the prospective adoptive parents and Y.D. referred to them as "Mommy and Daddy."

DSS reported that although the children had special needs, those needs were currently being met and the children were both "definitely adoptable." The social worker concluded that mother and father "have a full-time job trying to stay healthy and out of jail. Regrettably, despite the love these two adults have for their children, they cannot safely meet the children's basic needs, let alone their special needs. The children need and deserve full time parents that can meet their needs."

Mother and father both appeared at the contested section 366.26 hearing. Each of them had recently been released from jail. The parties stipulated to the section 366.26 report. Mother asked the court to find that the beneficial parental relationship exception to adoption applied and grant permanent guardianship to the prospective adoptive parents. Mother testified that she was "very bonded with [her] children" and added "I feel like they deserve [to] still be bonded with their mother as soon as I can get better myself and be with them." Through counsel, mother subsequently offered "that since the children have gone to San Diego, they've been unable to visit, not that they've been unwilling or that they aren't willing to present themselves for visitation. . . . It was just very difficult [for them] to get down there."

Counsel for DSS asserted that "the burden for any exception to adoption has [not] been met" and that "the children will benefit from the parents' continued sobriety, and we would encourage them to follow up on their programs and their plans, but at this time, [the children's] need for stability long term is clearly set forth. They are adoptable; they are in an adoptive placement; they are young children; and the parents' history of visitation and participation does not present sufficient evidence to deny the children the permanency that adoption provides."

At the conclusion of the hearing, the trial court found that the beneficial parental relationship exception did not apply. The court reasoned: "I understand that the parents love [M.D.] and [Y.D.] . . . . But visiting them and having a bond with them is not giving them permanency." The court added that "on this record, there is no way that I would do anything but have the children adopted." The court proceeded to terminate parental rights,

found by clear and convincing evidence that the children were adoptable, and set the matter for a six-month post-permanency review hearing.

DISCUSSION

Mother contends the court erred in finding that the beneficial parental relationship exception to adoption set forth in section 366.26, subdivision (c)(1)(B) did not apply. We disagree.

"After reunification services have terminated, the focus of a dependency proceeding shifts from family preservation to promoting the best interest of the child including the child's interest in a 'placement that is stable, permanent, and that allows the caretaker to make a full emotional commitment to the child. [Citation.]' [Citation.] The purpose of a section 366.26 hearing is to 'provide stable, permanent homes for' dependent children. [Citation.] At a section 366.26 hearing the juvenile court has three options: (1) to terminate parental rights and order adoption as a long-term plan; (2) to appoint a legal guardian for the dependent child; or (3) to order the child be placed in long-term foster care." (*In re Fernando M.* (2006) 138 Cal.App.4th 529, 534.)

"Adoption, where possible, is the permanent plan preferred by the Legislature." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 573 (*Autumn H.*).) If the court finds a child cannot be returned to his or her parent and is likely to be adopted if parental rights are terminated, the court must select adoption as the permanent plan unless the court finds a compelling reason for determining termination of parental rights would be detrimental to the child under any of the specified statutory exceptions. (§ 366.26, subds. (c)(1)(A), (B)(i)-(vi); *In re Erik P.* (2002) 104 Cal.App.4th 395, 401.) The parent has the burden of establishing one of the

specified statutory exceptions applies. (*In re T.S.* (2009) 175 Cal.App.4th 1031, 1039.) Because a section 366.26 hearing occurs "after the court has repeatedly found the parent unable to meet the child's needs, it is only in an extraordinary case that preservation of the parent's rights will prevail over the Legislature's preference for adoptive placement." (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350.)

The beneficial parental relationship exception, upon which mother relies, applies if termination of parental rights would be detrimental to the child because a parent has "maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(B)(i).) The exception applies only upon a showing that the parent-child relationship "promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent[-]child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent[-]child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.)

We apply the substantial evidence standard of review to the determination of whether a beneficial parental relationship exists. We apply the abuse of discretion standard of review to the determination of whether there is a compelling reason for finding the termination of parental rights would be detrimental to the child. (*In re Anthony B.* (2015) 239 Cal.App.4th 389, 395.)

Substantial evidence supports the trial court's finding that the beneficial parental relationship exception did not apply. Mother failed to meet her burden of proving either prong of the exception. During the reunification period, mother missed numerous supervised visits with the children. After reunification services were terminated, she visited the children only once. Although she offered that she was unable to travel to San Diego to visit the children after they were placed there, the record is devoid of any evidence that she made any effort to contact or correspond with the children via telephone, email, or letter. At the time of the section 366.26 hearing, mother apparently had not seen, spoken to, or otherwise communicated with the children in over three months. Because mother did not maintain regular visitation and contact with the children, she could not establish that the beneficial parental relationship exception applied.

Mother also failed to establish that M.D. and Y.D. would benefit from continuing the parent-child relationship, as contemplated in subdivision (c)(1)(B)(i) of section 366.26. "To overcome the preference for adoption and avoid termination of the natural parent's rights, the parent must show that severing the natural parent-child relationship would deprive the child of a *substantial*, positive emotional attachment such that the child would be *greatly* harmed. [Citations.] A biological parent who has failed to reunify with an adoptable child may not derail an adoption merely by showing the child would derive *some* benefit from continuing a relationship maintained during periods of visitation with the parent. [Citation.] A child who has been adjudged a dependent of the juvenile court should not be deprived of an adoptive parent when the natural parent has maintained a relationship that may be beneficial to some degree, but that does

not meet the child's need for a parent. [Citation.]" (*In re Angel B.* (2002) 97 Cal.App.4th 454, 466.)

In purporting to make the requisite showing, mother refers to DSS's February 2018 three-month status review report. The report states, among other things, that M.D. was "incredibly bonded to both of her parents" and told the social worker "that she wants to live with her mommy and daddy and that she misses them very much." The cited report, however, refers to circumstances as they existed at the time of the three-month review hearing, well before reunification services were terminated. The April 2018 six-month status review report—in which DSS recommended that reunification services be terminated—states that M.D. "rarely talks about missing her mother anymore and rarely mentions her father."

Moreover, there is nothing in the section 366.26 report to support a finding that either child was bonded to either parent to such a degree that freeing them for adoption was precluded; on the contrary, by that point in the proceedings Y.D. referred to the prospective adoptive parents as "mommy and daddy." Because nothing in the record supports a finding that either child would be "greatly harmed" if the parent-child relationship were terminated, the court did not err in finding that the beneficial parental relationship exception did not apply. (*In re Angel B.* (2002) 97 Cal.App.4th 454, 466.)

Appellant also cites several cases in support of her position that the beneficial parental relationship exception applied here. The cited cases, however, are plainly inapposite. Appellant is "essentially asking us to reweigh the evidence and to substitute [our] judgment for that of the trial court." (*In re Casey D.* (1999) 70 Cal.App.4th 38, 53.) The issue is not whether the court *could*

have found that the beneficial parental relationship exception to adoption applied, but rather whether it abused its discretion in finding otherwise. This simply is not the type of "extraordinary case" in which "preservation of the parent's rights will prevail over the Legislature's preference for adoptive placement." (*Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1350.)

DISPOSITION

The judgment (order terminating parental rights and selecting adoption as the permanent plan) is affirmed.

PERREN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

Charles S. Crandall, Judge
Superior Court County of San Luis Obispo

Konrad S. Lee, under appointment by the Court of Appeal, for Defendant and Appellant.

Rita L. Neal, County Counsel, Jenna Morton, Deputy County Counsel, for Petitioner and Respondent.